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Why DOMA's Definition of Marriage Is Good Policy and Should Be Defended

The Defense of Marriage Act, passed in 1996 by overwhelming bi-partisan majorities, does two things: it defines marriage for purposes of federal law as the union of one man and one woman, and it clarifies that states do not have to recognize same-sex marriages or polygamous marriages performed in other states or countries.

My purpose today is to defend the first idea: federalism works both ways: states have a right to regulate marriage for the purpose of state law; and the federal government has the right and responsibility—frequently exercised in U.S. history—to define what it means by marriage for the purpose of federal law.

Why Marriage is the Union of One Man and One Woman

Marriage is the union of husband and wife for a reason: these are the only unions that create new life and connect those children in love to their mother and father. This is not necessarily the reason why an individual person marries.

Individuals marry for a hundred private and personal reasons, for good reasons and less good reasons. The public purpose of marriage is the reason why society creates laws around marriage. Here the great public purpose of marriage has always been "responsible procreation"—rooted in the need to protect children by uniting them with the man and woman who made them.

Let's face it: a government license for romantic unions is a strange idea. Adults' intimate relationships, in our legal tradition, are typically nobody else's business. The more intimate and personal an adult relationship is the less likely the law is to be involved. I'm an aunt, I'm a best friend, I'm a mentor, I'm a godmother. In all these personal relationships the government is not involved.

Why is the government involved in marriage?

The answer in our society, and in virtually every known human society, is that the society recognizes there is an urgent need to bring together men and women to make and raise the next generation together. Marriage is a private desire that serves an urgent public good.

How does marriage protect children?

Marriage protects children by increasing the likelihood that children will be born to and raised by their mother and father in one family—and by decreasing the likelihood that the adults will create fatherless children in multiple households.

Note there is not some slew of magic special legal benefits that protect children that can be transferred to other family forms. We know this from the social science evidence showing that children do no better, on average, in remarried families than they do living with single mothers.[1] Marriage protects children to the extent that it helps increase the likelihood that children will be raised by their mother and father.

This is not merely my personal and private view; it is the overwhelming consensus of human history and U.S. law.

Marriage is a virtually universal human institution. Every human society has to grapple with three persistent facts about human beings everywhere: sex makes babies, societies need babies, babies deserve a father as well as a mother.

Marriage as a shared legal and social institution attempt to shape the erotic passions of the young, to communicate the importance of regulating sexual passion so that children are not born into fragmented families, and also to signal to those attracted to the opposite sex the time and place when uniting sexual desire and the desire for children is a positive good. Professors Margo Wilson and Martin Daly write:

> Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple's children. The marital alliance is fundamentally a reproductive alliance.[2]

Another academic treatment notes: "The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring."[3] As far back as 30 A.D., Musonious Rufus said:

> The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals.[4]

This deep orientation of marriage to what we now call "responsible procreation" is also the consensus deeply embedded in U.S. law. The U.S. Supreme Court said in 1888:"[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."[5] In 1942, the Court said: "Marriage and

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[1] *See* Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* (Harvard U. Press 1994) ("In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from one-parent families are more likely to become teen mothers, irrespective of the conditions under which they began to live with single mothers and irrespective of whether their mothers remarry or experience subsequent disruptions."). For a general review of the social science and legal history outlined here, *see* Maggie Gallagher, "(How) Will Gay Marriage Weaken Marriage as a Social Institution," 2 *University of St. Thomas Law Review* 33 (2004).

[2] Margo Wilson & Martin Daly, "Marital Cooperation and Conflict," in *Evolutionary Psychology, Public Policy and Personal Decisions* 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc., 2004).

[3] Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 5 (New York: Russell Sage Foundation, 1985).

[4] Musonius Rufus, Fragment 13A, "What Is the Chief End of Marriage?" translated in *Musonius Rufus: The Roman Socrates* 89 (Cora E. Lutz ed. & trans., 1947).

[5] Maynard v. Hill, 125 U.S. 190, 211 (1888).

procreation are fundamental to the very existence and survival of the race."[6] The Court quoted this latter statement and cited the former in its landmark case striking down antimiscegenation laws.[7]

This is the rationale for the national definition of marriage proposed by Congress in passing DOMA: "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."[8]

If we accept, as DOMA explicitly does, that this is a core purpose of marriage, then treating same-sex unions as marriages makes little sense. If marriage as a public and legal institution is oriented towards protecting children by increasing the likelihood they are born to and raised by the man and the woman whose union made them, then same-sex couples do not fit. If same-sex couples "fit" the public definition of marriage, then marriage is no longer about responsible procreation.

Same-sex marriage cuts marriage as a public idea off from these deep roots in the natural family. Over time the law will re-educate the next generation that these ancient and honorable ideals underlying marriage no longer apply. Gay marriage, as Judge Walker ruled in wrongly striking down Prop 8, is based on the idea that neither biology nor gender matters to children. Same-sex marriage repudiates the public's interest in trying to see that children are, to the extent possible, raised by the man and woman whose bodies made them in a loving single family.

Both gay marriage advocates and opponents have recognized that gay marriage has this radically transformative change in the public meaning of marriage. For example, same-sex marriage proponent E.J. Graff explained: "If same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers." Same-sex marriage, she argues, "does more than just fit; it announces that marriage has changed shape."[9] Ladelle McWhorter acknowledged: "[Heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well."[10]

What about other families? Marriage has never been the only pathway to a family. People have always lived in different situations, and we have (I believe) an obligation to help children in every family form. But we cannot do so by confusing the public purposes of marriage with other kinds of relationships. We should not rip up the road map laid down by history, by common sense, and by the collective wisdom of human experience by redefining marriage.

Gay Marriage Will Have Consequences

The great animating idea behind same-sex marriage is this: there are no relevant differences between same-sex and opposite sex unions, and if you see a difference there's something wrong with you. You are like a bigot opposed to interracial marriage.

When the law endorses this big new moral idea, under the misguided name of equality, it will have consequences.

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[6] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[7] Loving v. Virginia, 388 U. S. 1, 12 (1967).
[8] House Report, No. 104-664.
[9] E.J. Graff, "Retying the Knot," in *Same-Sex Marriage: Pro and Con: A Reader* 134, 135-137 (Andrew Sullivan ed., 1st ed., Vintage Books 1997).
[10] Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999).

If you want to see what this big new idea, embraced by law, means, ask yourself: how do we treat bigots who oppose interracial marriage. If we—and the law—accept the core ideas driving same-sex marriage, we will also have to accept the consequences for traditional faith communities, for those Americans who continue to believe that marriage is the union of husband and wife.

Already we are seeing graduate students kicked out of marriage counseling programs, physicians told they must choose between their values and their profession, Christian adoption agencies put out of business by the government. It's a felony to run an adoption agency without a license in the state of Massachusetts. When Catholic Charities asked the government for a narrow exemption so that they could continue to help needy children without violating Catholic teachings, the government said, "no, we would not do this if you refused to place couples with interracial couples, so we won't help you quote, unquote discriminate against same-sex couples either." Crystal Dixon was fired from her job at a university for expressing in a letter to the editor her opposition to gay marriage.

In our sister democracies, Canada and the U.K., the cancerous effects of this false equation of gay marriage and racial equality are starkly visible. Just a few weeks ago a court ruled that lovely black married couple, Mr. and Mrs. Johns, could be barred from fostering children because they were unable to actively affirm homosexuality as good.

Every day brings new evidence of the great lie that this movement is concerned only about helping our gay friends and neighbors live as they choose. This movement aims to follow the path laid down by the civil rights movement and use the power of government to reshape society by repressing, stigmatizing and excluding those who do not share their vision of "marriage equality."

Let me issue here today a clear warning: If gay marriage is accepted in law, then the consequences will be not only a redefinition of marriage, but a redefinition of the place of traditional faith communities in the American public sphere. What lies ahead is in my view best captured by the Islamic term "dhimmitude." Christian, orthodox Jewish, Muslim and other traditional faith communities will be permitted to exist, as second class citizens, subjected to dramatic new legal restraints designed to minimize the influence of their so-called "anti-equality" ideas in the public square.

Another way of putting this emerging conflict is: when equality and religious liberty come into conflict, religious liberty loses.[11] By defining gay marriage as an "equality" issue gay marriage advocates are ensuring that gay marriage will not only facilitate private relationships of gay couples, it will create a substantive new government-backed morality enforced in the public square.

DOMA thus protects against a radical redefinition not only of marriage but of the American and the Judeo-Christian tradition.

Failing to Defend DOMA Invites Courts to Recognize Polygamous Unions as Well

The federal government has a right to define marriage for federal purposes, whether the issue is same-sex marriage or polygamy. This right has long been recognized in U.S. law and constitutional governance and does not conflict with federalism.

The federal government has frequently defined terms like "marriage" and "children" and "spouse" for the purpose of immigration, taxes, the Census and other areas in ways that sometimes are different from state law. The alternative to a proper federalism is to make the 10th amendment a kind of reverse supremacy clause in which four judges on a court in Massachusetts get to decide for the American people as a whole what constitutes a marriage.

[11] *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, Robin Fretwell Wilson, Douglas Laycock, & Anthony Picarello, editors (Rowman & Littlefield 2008).

Professors Linda Elrod and Robert Spector have noted: "Probably one of the most significant changes of the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans."[12]

Definitions of marriage and family are deeply embedded in federal laws ranging from immigration,[13] land grants,[14] military benefits and pensions,[15] other pensions,[16] the census,[17] copyright,[18] and bankruptcy.[19]

Congress has defined marriage for federal law purposes in the law of immigration,[20] taxation[21] and the Census[22] even though these definitions are sometimes contrary to the definitions of marriage for the state in which the affected individuals live.

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[12] Linda D. Elrod & Robert G. Spector, "A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue," 42 *Fam. L.Q.* 713, 713, 751 (2009).

[13] Naturalization Act of 1802, 2 Stat. 153 (1802); Act of Feb. 10, 1855, 10 Stat. 604 (1855).

[14] Act of Mar. 3, 1803, 2 Stat. 229 (1803); Land Act of 1804, 2 Stat. 283 (1804); Homestead Act of 1862, 12 Stat. 392 (1862); McCune v. Essig, 199 U.S. 382 (1905).

[15] Act of July 4, 1836, ch. 362, 5 Stat. 127, 127–28 (1836); Act of June 27, 1890, ch. 634, 26 Stat. 182, 182–83 (1890); See United States v. Jordan, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); United States v. Richardson, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); United States v. Rohrbaugh, 2 C.M.R. 756, 758 (1952) (noting, inter alia, that common law marriages are specifically recognized "in a variety of matters").

[16] *See* Boggs v. Boggs, 520 U.S. 833, 854 (1997) (pensions governed under ERISA, which preempts community property law); Mansell v. Mansell, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); McCarty v. McCarty, 453 U.S. 210, 232–33, 236 (1981) (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979)), superseded by Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); Hisquierdo, 439 U.S. at 582, 590 (railroad retirement assets governed by federal law, not community property law); Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); Wissner v. Wissner, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

[17] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), available at http://www.census.gov/prod/2002pubs/pol02-ma.pdf.

[18] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); De Sylva v. Ballentine, 351 U.S. 570, 582 (1956); 19 17 U.S.C. § 101 (2006); KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.5 (1982).

[19] H.R. REP. NO. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320; Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); Stout v. Prussel, 691 F.2d 859, 861 (9th Cir.1982).

[20] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e); In re Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); Kleinfield v. Veruki, 173 Va. App. 183, 372 S.E. 2d 407, 410 (Va. Ct. App. 1988); Lutwak v. United States, 344 U.S. 604, 611 (1953); id. at 620–21 (Jackson, J., dissenting); see also Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1994) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979)(arguing that the possibility of marriage being a sham is irrelevant because of valid New Mexicomarriage is deemed "frivolous" because of INS' authority to inquire into marriage for immigration purposes); United States v. Sacco, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).

[21] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status); Rev. Rul. 76-255, 1976-2 C.B. 40. *See* Linda D. Elrod & Robert G. Spector, "A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue,"

As a nation, we settled this question in the 19th century when the issue was polygamy. The national government passed multiple laws to ensure that polygamy did not become the norm in the U.S.[23]

And the issue may soon be polygamy again. Less than ten years after the Canadian courts imposed same-sex marriage, polygamists are now in court arguing for their right to marry as well. To say that the federal government must accept same-sex unions as marriages, if any state does, also means that the federal government must accept polygamous unions as marriages, if four judges on any state court decide the right to marry includes polygamy.

DOMA not only protect the idea that marriage united male and female, it protects monogamy as well: only one man and one woman are a marriage under federal law.

By failing to defend DOMA, and repudiating procreation as a purpose of marriage, Pres. Obama and the Department of Justice are actually endangering the marriage laws of 45 states.

The Supreme Court only rarely chooses to strike down laws passed by Congress directly. Eliminating DOMA would make it easier for gay marriage advocates to win the Prop 8 case now working its way through the 9th Circuit to the Supreme Court. Failing to defend DOMA, at this point, would invite the Supreme Court to strike down Prop 8 and marriage laws in 45 states.

Pres. Obama has Actively Sabotaged the Defense of DOMA

Ed Whelan lays out this argument in detail. I would like to quote, however, from a column by the distinguished libertarian legal scholar Richard Epstein, who favors same-sex marriage, and who opposes DOMA as policy (but believes it is eminently defensible on constitutional grounds) about how poor President Obama's legal defense of DOMA has been:

> In Gill and Massachusetts, Judge Tauro . . .pushed hard in two inconsistent directions. He first claimed that the definition of marriage was exclusively a function of state sovereignty, in which the United States could not intrude under the Tenth Amendment, which holds that those powers not delegated to the federal government remain vested in the states. Indeed, he went so far to make the weird claim that even the federal power to tax and spend did not allow it to define marriage for the purposes of federal expenditures.
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> But it only gets more convoluted. To strike down DOMA, Judge Tauro had to reject all state justifications for its definition of marriage. Congress advanced four such justifications for this statute: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality,

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42 *Fam L. Q.* 713, 714–15 (2009)(discussing Nihiser v. Comm'r, 95 T.C.M. (CCH) 1531 (2008); Perkins v. Comm'r, 95 T.C.M (CCH) 1165 (2008); Proctor v. Comm'r, 129 T.C. 92 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

[22] "Census to Recognize Same-Sex Marriages in '10 Count," *N.Y. Times*, June 21, 2009, available at http://www.nytimes.com/2009/06/21/us/21census.html?_r=1; "Census Bureau Urges Same-Sex Couples to be Counted," *USA Today*, April 6, 2010, available at http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm.

[23] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgibin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532; 18 Stat. 253, 1874; Forty-seventh Congress, Sess. I, Ch. 47; 24 Stat. 635, 1887; Act of July 16, 1894, ch. 138, 28 Stat. 107; Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgibin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532; Reynolds v. United States, 98 U.S. 145 (1878); Murphy v. Ramsey, 114 U.S. 15 (1885); Ex Parte Snow, 20 U.S. 274 (1887); Cannon v. United States, 116 U.S. 55, 72 (1885); The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); Act of July 16, 1894, ch. 138, 28 Stat. 107.

> and (4) preserving scarce resources." The Justice Department disavowed them all. So much for tradition. Its sole defense of DOMA was that it was needed to preserve the status quo until matters were sorted out politically. Given that open invitation Judge Tauro concluded that all of the justifications offered in DOMA flunked even the lowest "conceivable" standard of rationality. Religious people will surely take umbrage at his one-sentence rebuttals of centuries of tradition. This controversial case might well go up on appeal. But if so, it looks almost like collusive litigation, unless some true defender of DOMA is allowed, as an intervener, to defend the statute on the merits.[24]

Fortunately the House has taken that step to be the true defender of DOMA, and to defend DOMA on the merits.

Conclusion

Marriage as the union of a man and a woman is the national norm, the consensus of state law, and of human history. Every single time the American people have had the chance to vote, 31 out of 31 times, they have affirmed that marriage is and should remain the union of husband and wife.

Exit polls from the election last November showed American people oppose same-sex marriage 54 to 40 percent.[25] Last November the people of Iowa showed their displeasure with gay marriage by refusing, for the first time in modern Iowa history, to retain three judges who voted to impose gay marriage. A few weeks ago, in the deep blue state of Maryland, an enormous outpouring of public opposition, especially from the black church, killed a gay marriage bill that was supposed to easily pass the Maryland House. In Rhode Island, another deep blue state, the same story is unfolding: after promising to quickly pass a gay marriage bill through the House, the speaker had to pull the bill and the headlines there indicate that they do not have the votes to pass.

This rejection of gay marriage, even in deeply Democratic and liberal states, is not due to any secret backroom influence, but to an amazing, great, underreported outpouring by the American people, a rainbow coalition of people of all races, creeds, and colors who say that while yes we may need to find a way to express concern about and compassion for our gay friends, neighbors and fellow citizens, no, please, don't mess with marriage.

The House leadership is to be congratulated for stepping forward and defending marriage by defending DOMA.

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[24] Richard A. Epstein, "Judicial Offensive Against Defense of Marriage Act," *Forbes*, July 12, 2010 at http://www.forbes.com/2010/07/12/gay-marriage-massachusettssupreme-courtopinions-columnists-richard-a-epstein.html.

[25] CNN 2010 Exit Polls at http://www.cnn.com/ELECTION/2010/results/polls/#val=USH00p3.